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BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Federal-State Board on	)	CC Docket No. 96-45
Universal Service	)	

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COMMENTS OF MOBILEMEDIA COMMUNICATIONS, INC.

Gene P. Belardi
Vice President

MobileMedia Communications, Inc.
2101 Wilson Boulevard, Suite 935
Arlington, Virginia 22201
(703) 312-5152

April 12, 1996

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COMMENTS OF MOBILEMEDIA COMMUNICATIONS, INC.

MobileMedia Communications, Inc. ("MobileMedia"),[1] hereby submits these comments in response to the Notice of Proposed Rulemaking in the above-captioned docket.[2] In this proceeding, the Commission seeks comment on various proposals to implement, in part, the Congressional directives set forth in Section 254 of the Communications Act regarding the preservation and advancement of universal service.[3]

I. INTRODUCTION AND SUMMARY

The 1996 Act amended the Communications Act to add a new Section 254 entitled "Universal Service." This new section particularizes the Commission's

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1 MobileMedia, the parent company of MobileMedia Paging, Inc. and Mobile Communications Corporation of America, holds narrowband paging licenses throughout the common carrier and private carrier bands. In addition, the company has two nationwide one-way wireless networks, and two nationwide narrowband PCS licenses.

2 *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking and Order Establishing Joint Board, FCC 96-93 (rel. Mar. 8, 1996) ("*NPRM*"). By Order released April 1, 1996 (DA 96-43), the Commission extended the Comment deadline to April 12, 1996.

3 Section 254 of the Communications Act was recently adopted in the Telecommunications Act of 1996, § 101, Pub. Law No. 104-104, 110 Stat. 56, 71 (1996) ("1996 Act") (to be codified at 47 U.S.C. § 254).

responsibility under Section 1 of the Communications Act to "make available, so far as possible, to all the people in the United States, without discrimination on the basis of race, color, religion, national origin, or sex a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges."[4] Section 254 requires that the Commission, together with a newly established Federal-State Joint Board, develop policies for the preservation and advancement of universal service based on various principles: quality services at just, reasonable and affordable rates; specific and predictable support mechanisms; equitable and nondiscriminatory contributions; access to advanced telecommunications services for schools, health care and libraries; and access to telecommunications services in all regions of the country.[5]

In partial response to this Congressional directive, the Commission has requested comment on how to divide the financial responsibility between interstate and intrastate telecommunications carriers for the costs associated with the interstate universal service support mechanisms it ultimately adopts.[6] MobileMedia submits that Section 332(c) of the Communications Act exempts traditional, one-way paging companies[7] such as MobileMedia, from bearing any financial responsibility for costs associated with support

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4 47 U.S.C. § 151, *as amended by* 1996 Act § 104, 11 Stat. at 86.

5 1996 Act, §101 (to be codified at 47 U.S.C. § 254(b)(1)-(6)).

6 *NPRM* at ¶ 117.

7 The terms "one-way paging" and "narrowband paging" are used interchangeably herein.

for intrastate universal service.[8] MobileMedia submits further that the de minimis exception set forth in Section 254(d) exempts paging carriers from universal service contribution requirements for interstate services as well. Should the Commission determine that narrowband paging companies must contribute toward the cost of interstate universal service, equity dictates that contributions from paging carriers be kept to an absolute minimum, at a level that is proportionately lower than that required of other telecommunications carriers. Unlike other providers of interstate telecommunications services, paging carriers are not recipients of universal service funding support. This fact, in addition to the paging industry's low or non-existent profit margins, make large contributions both inequitable and discriminatory.

II. SECTION 332(c)(3) OF THE COMMUNICATIONS ACT EXEMPTS CMRS PROVIDERS FROM STATE-IMPOSED UNIVERSAL SERVICE OBLIGATIONS

A. The 1993 Act

The 1993 Budget Act revisions to the Communications Act of 1934 completely overhauled the regulatory scheme applicable to CMRS, including one-way paging. The purpose of these revisions was to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[9] Recognizing the inherently interstate

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[8] As discussed herein, Section 332(c) of the Communications Act exempts the entire class of CMRS providers from intrastate universal service obligations. MobileMedia, however, focuses its comments on Section 332(c)'s preemption with respect to one-way paging as a distinct subset of CMRS.

[9] H.R. Rep. No. 111, 103d Cong. 1st Sess. 260 (1993).

nature of CMRS, Congress granted the Commission exclusive jurisdiction over one-way paging and other types of CMRS.[10]

Directly relevant to the matters at issue in the instant proceeding, Section 332(c)(3) specifically exempts CMRS providers, including one-way paging providers, from state-imposed universal service obligations except "where such services are a substitute for land line telephone exchange services for a substantial portion of the communications within such a State."[11] One-way paging is not, and never will be, a substitute for land line telephone exchange service in any state, a fact which has been demonstrated in the various proceedings addressing the state petitions seeking authority to regulate CMRS rates.

Specifically, Section 332(c)(3)(A)(ii) provided a limited opportunity for states to regulate CMRS rates if they could demonstrate, *inter alia*, that CMRS was "a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State."[12] This standard is essentially identical to

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10 Both the language "as well as the title of Section 332(c)(3) ("State Preemption") express an unambiguous congressional intent to foreclose state regulation in the first instance." *Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, PR Docket No. 94-105, GN Docket No. 93-252, Report and Order, 10 FCC Rcd 7486, 7495 (1995), *aff'd on recon.* 1 C.R. (P&F) 1157 (1995), *citing CMRS Second Report and Order,* 9 FCC Rcd at 1504.

11 47 U.S.C. § 332(c)(3).

12 47 U.S.C. § 332(c)(3)(A)(ii). The Commission has construed this language to mean that states must demonstrate that anticompetitive market conditions exist, and that CMRS is "the sole means of obtaining telephone exchange service in a substantial portion of the state . . . ." *Petition of Arizona Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services and Implementation of Sections 3(n) and 332*

(continued...)

the one discussed above regarding the states' authority to assert universal service jurisdiction over CMRS providers. Only eight states filed petitions seeking continued CMRS rate authority, although none tried to justify continued regulation of paging services. Only two states - - Arizona and Wyoming - - addressed the Section 332(c)(3)(A)(ii) standard for CMRS other than paging. Wyoming later withdrew its petition,[13] and Arizona's was denied.

Although Arizona did not assert that its Petition was being filed pursuant to Section 332(c)(3)(A)(ii), Arizona did argue that CMRS should be regarded as a replacement for land line service because (1) it was a substitute for traditional, basic land line telephone service; and (2) it was a connecting link to the land line network.[14] The Commission specifically addressed these two contentions and found that Arizona had

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12 (...continued) *of the Communications Act*, PR Docket No. 94-104, GN Docket No. 93-252, Report and Order and Order on Reconsideration, 10 FCC Rcd 7824, 7838 (1995) (emphasis added) ("*Arizona Report and Order*").

13 The Wyoming PSC asserted that fixed cellular service could be used as a replacement for land line telephone service. It did not allege that this fixed service was in fact a substitute for a substantial portion of the telephone land line exchange service, as the statute requires. *Petition of the Wyoming Public Service Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services and Implementation of Sections 3(n) and 332 of the Communications Act*, filed Aug. 8, 1994.

14 As factual support for these assertions, Arizona merely claimed that "many" rural households in six of the eight cellular markets in Arizona used cellular as a substitute for basic telephone service. *Arizona Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services and Implementation of Sections 3(n) and 332 of the Communications Act*, PR Docket No. 94-104, filed Aug. 8, 1994, at 19.

"not made an adequate showing" under the Section 332(c)(3)(A)(ii) standard.[15] The Commission reached this conclusion, in part, because it found that Arizona had not provided evidence of "the number of individuals in that State for whom CMRS is the only available telephone exchange service . . . ."[16] The inability of Arizona to meet the Section 332(c)(3)(A)(ii) showing, coupled with the failure of other states to even raise the issue, underscores the conclusion that CMRS is not a "replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within [a] State" for purposes of rate regulation. It necessarily follows that CMRS is likewise not a "substitute for land line telephone exchange service for a substantial portion of the communications within [a] State." This is especially true for narrowband paging services which, by virtue of their one-way nature, will never replace land line exchange services. Thus, Section 332(c)(3)(A) of the 1993 Budget Act definitively preempts the states' authority to impose universal service requirements on paging companies such as MobileMedia.[17]

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15 *Arizona Report and Order*, 10 FCC Rcd. at 7838-39.

16 *Id.* (emphasis added).

17 A further justification for not subjecting one-way paging carriers to state universal service obligations is found in Section 254(d)'s de minimis exemption. Currently, very few states actually regulate paging. Consequently, paging carriers have no internal mechanisms or procedures to comply with state-imposed obligations, such as universal service funding requirements. Requiring paging carriers, which have little or no profit margins, as discussed herein, to now develop internal procedures to comply with universal service obligations for a multiplicity of states would be enormously burdensome, both administratively as well as financially. Thus, one-way paging carriers clearly fall within the Section 254(d) de minimis exemption.

B. The 1996 Act

In MobileMedia's view, the regulatory provisions adopted in the 1996 Act did not rescind the 1993 Budget Act's preemption of state regulatory authority to impose intrastate universal service obligations on one-way paging companies. Nothing in the 1996 Act explicitly repeals that preemptive action, and it would be wholly contrary to long-established canons of statutory construction to simply infer that Congress intended to reverse a measure it adopted less than three years earlier.[18] Moreover, Section 253(e) of the 1996 Act provides that '[n]othing in this section shall affect the application of 332(c)(3) to commercial mobile providers." This is a clear statement by Congress that the 1996 Act was not intended to eliminate the Budget's Act preemption of state authority over CMRS, including one-way paging.[19] The states' lack of authority to impose universal service obligations on CMRS providers (particularly on one-way paging companies), as prescribed in the Budget Act, therefore remains intact.

This conclusion is easily reconciled with the language of Section 254(f) which provides that "[e]very telecommunications carrier that provides intrastate telecommuni-

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[18] *See, e.g., United States v. Welden*, 377 U.S. 95, 103 n.12 (1964) (amendments and repeals by implication are disfavored); *Cheney R.R. Co. v. Railroad Retirement Bd.*, 50 F.3d 1071, 1078 (D.C. Cir. 1995) (because amendments by implication are disfavored, the court "will not lightly infer" that a prior and still-existing statute is amended by a subsequent Act of Congress); *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988) (regardless of function of "enmeshing" of two statutes, amendments and repeals by implication are disfavored because of policy that "legislatures, not courts, amend and repeal statutes.").

[19] Section 601(c)(1) of the 1996 Act lends further support to this argument. Section 601(c)(1) specifically preserves Section 332(c)(3)'s preemptive power by stating that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly so provided in such Act or amendments."

cations services shall contribute . . . to the preservation and advancement of universal service in that State." Prior to the adoption of the 1993 Budget Act, the Commission's jurisdiction was limited to interstate services by virtue of Section 2(b) of the Communications Act, which reserved to the states jurisdiction over intrastate services. The 1993 Budget Act revisions to Sections 2(b) and 332, however, changed this dual jurisdictional scheme by eliminating the interstate/intrastate jurisdictional dichotomy with respect to one-way paging and other types of CMRS.[20] Thus, by virtue of the 1993 Budget Act, all paging services are jurisdictionally interstate, and thus do not provide "intrastate telecommunications services" as this term is used in Section 254(f).

Even if the 1993 Budget Act and the 1996 Act are considered to be inconsistent on this point, MobileMedia submits that the directives in the 1993 Budget Act must govern here. The 1993 Budget Act is explicit on the issue of the states' lack of authority to impose universal service obligations on one-way paging and other types of CMRS providers. This is in stark contrast to the general grant of authority to the states contained in Section 254(f), which makes no specific mention of CMRS.[21]

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20 Congress amended Section 2(b) of the Communications Act to clarify that the traditional reservation of state authority over intrastate services did not extend to services regulated under Section 332, *i.e.*, CMRS. As amended, Section 2(b) now reads "[e]xcept as provided in . . . Section 332 . . . nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service by wire or radio of any carrier . . . ." 47 U.S.C. § 152(b).

21 When a statute is explicit on a particular issue, the explicit statute takes precedence over a later enacted but more general statute. *See, e.g., Simpson v. United States*, 435 U.S. 6, 15 (1978) (giving precedence to terms of more specific statute where it and a general statute speak to same issue, even if the general provision was enacted later); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (finding that a statute dealing with a narrow, precise, and specific

(continued...)

III. WITH RESPECT TO INTERSTATE UNIVERSAL SERVICE, PAGING CARRIERS ARE SUBJECT TO THE DE MINIMIS EXCEPTION AUTHORIZED BY CONGRESS

Congress has authorized the Commission to create an exemption to the Section 254(d) requirement that every telecommunications carrier providing interstate telecommunications services contribute to the universal service funding mechanism established by the Commission. Section 254(d) provides that "[t]he Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis."[22] A plain reading of Section 254(d) of the Communications Act simply reveals that the Commis-

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21 (...continued)
issue is not subsumed by a later enacted statute addressing a more generalized, but related subject); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (absent a clear intention to the contrary, a specific statute will not be controlled or nullified by a generally worded statute, regardless of priority of enactment).

22 MobileMedia recognizes that the Conference Report associated with the 1996 Act provides that "this authority would only be used in cases where the administrative cost of collecting contributions from a carrier or carriers would exceed the contribution that carrier would otherwise have to make under the formula for contributions selected by the Commission." S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 131 (1996). Nothing in the language of Section 254(d), however, would lead to the conclusion that the administrative cost of collecting universal service fund contributions has any relevance to a determination of whether a contribution is "de minimis." Courts have held that an agency may not resort to the statute's legislative history when the statute's plain meaning is clear and unequivocal on its face, and the clear language does not lead to an irrational result that Congress could not have intended. *See Eagle-Picher Industries v. United States E.P.A.*, 759 F.2d 922, 929 (D.C. Cir. 1985) (where a conflict exists between statutory language and a portion of the legislative history, the statute controls); *United States v. Oregon*, 366 U.S. 643, 648 (1960); *ACLU v. FCC*, 823 F.2d 1554, 1569 (D.C. Cir. 1987) (*citing* with approval its statement in *FAIC Securities v. United States*, 768 F.2d 352, 362 (D.C. Cir. 1985), that "[o]nly where [the statutory] expression is genuinely ambiguous is a legislative history useful or necessary.").

sion is authorized to create an exemption for carriers engaged in very limited telecommunications activities and, as a consequence, would contribute a correspondingly small amount to a universal service funding mechanism. As demonstrated herein, one-way paging companies qualify for such an exemption with respect to contributions to interstate universal support funding mechanisms.

Paging carriers such as MobileMedia only offer narrowband, one-way paging service. Because their range of services is limited, revenues of paging carriers are an insignificant percentage of all telecommunications industry revenues.[23] Indeed, the 1994 Telecommunications Relay Services Fund ("TRS Fund") contribution of mobile service carriers, a category of providers that includes paging carriers, comprised only .6% of all TRS Fund contributions.[24] Obviously, the paging industry's TRS Fund contributions, which are based on gross revenues, are de minimis. Consistent with Section 254(d) of the 1996 Act, the Commission should therefore exempt narrowband paging carriers from having to contribute toward the cost of interstate universal service because the level of their contribution clearly would be negligible.

A related justification for exempting narrowband paging carriers from universal service obligations is found in the analysis underlying the 1993 Budget Act revisions to

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[23] On April 10, 1996, the Common Carrier Bureau ("CCB") released a Common Carrier Competition Report wherein the CCB stated that in 1994, paging carriers, together with competitive access providers, dispatch carriers, operator service providers, pay phone operators and resellers, accounted for just <u>3%</u> of all telecommunications revenues. *Spring 1996 Common Carrier Competition Report* (Apr. 10, 1996) at 6. By comparison, cellular carriers alone accounted for 7%. *Id.*

[24] *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Table 2 (Feb. 1996).

Section 332. As noted above, Section 332(c)(3) specifically exempts CMRS providers from state-imposed universal service obligations except "where such services are a substitute for land line telephone exchange services for a substantial portion of the communications within such a State."[25] Implicit in this standard is Congress' intent that providers of services such as one-way paging, which will never be a substitute for local exchange services, would never be appropriate candidates for universal service contributions on any level. This reasoning should be carried forward to the instant proceeding.

IV. AT WORST, PAGING CARRIERS SHOULD BE REQUIRED TO CONTRIBUTE PROPORTIONATELY LESS THAN OTHER TELECOMMUNICATIONS CARRIERS

Section 254(b)(4) states that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." Congress' concern that contributions be equitable is reiterated in Section 254(d) which requires that telecommunications carriers providing interstate telecommunications services contribute "on an equitable and nondiscriminatory basis" to the universal service funding mechanism adopted by the Commission. As explained below, equity dictates that any universal service fund contributions imposed on narrowband paging carriers be proportionately smaller than the contributions required of other telecommunications service providers.

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[25] 47 U.S.C. § 332(c)(3).

A. One-Way Paging Licensees Are Not Recipients of Universal Service Funds

The Commission tentatively concludes that voice grade access to the public switched network, touch-tone, single party service, access to emergency services (911) and access to operator services are the "core" services which will be entitled to universal service support.[26] The Commission explains that each of these traditional, dial-tone services is "indispensable" and therefore a "core" service because each is subscribed to by a majority of residential users, each is widely deployed through the public switched network and each is essential to education, public health and public safety. One-way paging does not fall into any of these designated categories. One-way paging is, therefore, outside the range of services that the Commission has tentatively concluded will be eligible for support. This fact warrants the imposition of a proportionately smaller contribution requirement for one-way paging than is applied to other segments of the telecommunications industry which will actually be in a position to receive universal service support.

B. One-Way Paging Companies Operate With Low or Negative Profit Margins

Pursuant to Section 9 of the Communications Act, Congress required the Commission to collect $116,400,000 in FY 1995 to recover certain of the Commission's regulatory costs. The Commission commenced a rule making wherein it revised its regulatory fee schedule, amended it to collect regulatory fees from regulatees of services

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[26] *NPRM* at ¶¶ 15-22.

not included in the FY 1994 Schedule, and modified the method of assessing fees for certain services.[27]

MobileMedia notes that not one of the publicly traded paging companies has reported a profit in the last several years. Not surprisingly, the Commission determined in the regulatory fee proceeding that the paging industry "has low profit margins compared to the cellular industry and to other public mobile services."[28] Consistent with its finding, the Commission established a separate and lower fee category for regulatees offering one-way paging services. The Commission intended the separate and lower fee category to "provide an equitable cost allocation among cellular and other public mobile licensees and paging licensees based upon their relative market pricing structures while minimizing any adverse impact on the one-way paging industry."[29]

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27 *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1995, Price Cap Treatment of Regulatory Fees Imposed by Section 9 of the Act*, MD Docket No. 95-3, Report and Order, 10 FCC Rcd 13512 (1995) ("*Fee Order*").

28 *Id.* at 13544. These low profit margins are attributable to operation in an industry that is "highly competitive." *Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1468 (1994), *recon. in part*, 10 FCC Rcd 7824 (1995).

29 *Fee Order*, 10 FCC Rcd at 13544 (emphasis added). Similarly, during a recent case in Texas District Court, it was determined that the disparity in revenues between CMRS carriers, including one-way paging, and other telecommunications providers precluded the state from requiring CMRS providers and non-CMRS providers to contribute the same amount to a state Telecommunications Infrastructure Fund. Specifically, the court found that CMRS providers had to contribute 6.479% of their revenues to satisfy a flat $75 million state funding requirement, whereas non-CMRS providers only had to contribute 1.362% of their revenues. In light of this disparate impact, the court found that the flat $75 million assessment violated Texas' Equal and Uniform Taxation clause. *Paging Companies for a Fair Assessment v. John Sharp, Comptroller of Public Accounts for the State of Texas, Martha Whitehead,*

(continued...)

The Commission reached this decision, in part, because of statistics which demonstrated that while the Commission was proposing to impose the same regulatory fee on both cellular and paging carriers, cellular carriers averaged nearly $70 per unit per month while paging carriers averaged only $10 per unit per month.[30] Thus, the revised regulatory fee would have a disproportionate effect on paging carriers which have a much lower profit margin than cellular carriers. The Commission, finding this result to be inequitable, created a reduced fee category for paging.

Given the Commission's determination that the paging industry has a much smaller profit margin than other segments of the telecommunications industry, it would clearly be inequitable and discriminatory for the Commission to now subject paging carriers to the same contribution requirement imposed on other segments of the industry whose profit margins are much higher. The reasoning applied in the regulatory fee proceeding is equally applicable here.

IV. CONCLUSION

As demonstrated herein, Section 332(c) of the Communications Act exempts traditional, one-way paging companies from bearing any financial responsibility for costs associated with support for intrastate universal service. In addition, the de minimis exception set forth in Section 254(d) exempts paging carriers from universal service

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29 (...continued)
Treasurer of the State of Texas, and Dan Morales, Attorney General of the State of Texas, Findings of Fact and Conclusions of Law, No. 95-15783 (Tex. 261st Dist., Findings of Fact and Conclusions of Law, filed Mar. 13, 1996).

30 *See* Comments of MobileMedia Communications, Inc., MD Docket No. 95-3, filed Feb. 13, 1995.

contribution requirements for interstate services. To the extent the Commission determines that one-way paging companies must contribute toward the cost of interstate universal service, equity dictates that such contributions be proportionately lower than that required of other telecommunications carriers.

Respectfully submitted,

Gene P. Belardi
Vice President
MobileMedia Communications, Inc.
2101 Wilson Boulevard, Suite 935
Arlington, Virginia 22201
(703) 312-5152

April 12, 1996

CERTIFICATE OF SERVICE

I, Phyllis Martin, do hereby certify that copies of the foregoing "Comments of MobileMedia Communications, Inc." were served this 12th day of April, 1996 by first class United States mail, postage prepaid to the following:

*The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

*The Honorable Andrew C. Barrett
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

*The Honorable Susan Ness, Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

The Honorable Julia Johnson
Commissioner
Florida Public Service Commission
Capital Circle Office Center
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

The Honorable Kenneth McClure
Vice Chairman
Missouri Public Service Commission
301 W. High Street, Suite 530
Jefferson City, MO 65102

The Honorable Sharon L. Nelson
Chairman
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250

The Honorable Laska Schoenfelder
Commissioner
South Dakota Public Utilities Commission
500 E. Capital Avenue
Pierre, SD 57501

Martha S. Hogerty
Public Counsel for the State of Missouri
P.O. Box 7800
Harry S. Truman Building, Room 250
Jefferson City, MO 65102

*Deborah Dupont, Federal Staff Chair
Federal Communications Commission
2000 L Street, N.W., Suite 257
Washington, D.C. 20036

Paul E. Pederson, State Staff Chair
Missouri Public Service Commission
P.O. Box 360
Truman State Office Building
Jefferson City, MO 65102

Eileen Benner
Idaho Public Utilities Commission
P.O. Box 83720
Boise, ID 83720-0074

Charles Bolle
South Dakota Public Utilities Commission
State Capital, 500 E. Capital Avenue
Pierre, SD 57501-5070

Lorraine Kenyon
Alaska Public Utilities Commission
1016 West Sixth Avenue, Suite 400
Anchorage, AK 99501

Debra M. Kriete
Pennsylvania Public Utilities Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

*Clara Kuehn
Federal Communications Commission
2000 L Street, N.W., Suite 257
Washington, D.C. 20036

Mark Long
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, FL 32399-0850

Samuel Loudenslager
Arkansas Public Service Commission
P.O. Box 400
Little Rock, AR 72203-0400

Sandra Makeeff
Iowa Utilities Board
Lucas State Office Building
Des Moines, IA 50319

Philip F. McClelland
Pennsylvania Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, Pennsylvania 17120

Michael A. McRae
D.C. Office of the People's Counsel
1133 15th Street, N.W., Suite 500
Washington, D.C. 20005

*Rafi Mohammed
Federal Communications Commission
2000 L Street, N.W., Suite 812
Washington, D.C. 20036

Terry Monroe
New York Public Service Commission
Three Empire Plaza
Albany, NY 12223

*Andrew Mulitz
Federal Communications Commission
2000 L Street, N.W., Suite 257
Washington, D.C. 20036

*Mark Nadel
Federal Communications Commission
1919 M Street, N.W., Room 542
Washington, D.C. 20554

*Gary Oddi
Federal Communications Commission
2000 L Street, N.W., Suite 257
Washington, D.C. 20036

Teresa Pitts
Washington Utilities and Transportation
Commission
P.O. Box 47250
Olympia, WA 98504-7250

*Jeanine Poltronieri
Federal Communications Commission
2000 L Street, N.W., Suite 257
Washington, D.C. 20036

James Bradford Ramsay
National Association of Regulatory Utility
Commissioners
1201 Constitution Avenue, N.W.
Washington, D.C. 20423

*Jonathan Reel
Federal Communications Commission
2000 L Street, N.W., Suite 257
Washington, D.C. 20036

Brian Roberts
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102-3298

*Gary Seigel
Federal Communications Commission
2000 L Street, N.W., Suite 812
Washington, D.C. 20036

*Pamela Szymczak
Federal Communications Commission
2000 L Street, N.W., Suite 257
Washington, D.C. 20036

*Whiting Thayer
Federal Communications Commission
2000 L Street, N.W., Suite 812
Washington, D.C. 20036

Deborah S. Waldbaum
Colorado Office of Consumer Counsel
1580 Logan Street, Suite 610
Denver, Colorado 80203

*Alex Belinfante
Federal Communications Commission
2033 M Street, N.W., Room 500
Washington, D.C. 20554

*Larry Povich
Federal Communications Commission
2033 M Street, N.W., Room 500
Washington, D.C. 20554

*William Howden
Federal Communications Commission
2000 L Street, N.W., Suite 812
Washington, D.C. 20036

Phyllis Martin

*By Hand